

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-7099

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BISWANATH HALDER,

Plaintiff-Appellant,

-against-

INTERNATIONAL BUSINESS MACHINES
CORPORATION,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of New York.

BRIEF ON BEHALF OF DEFENDANT-APPELLEE

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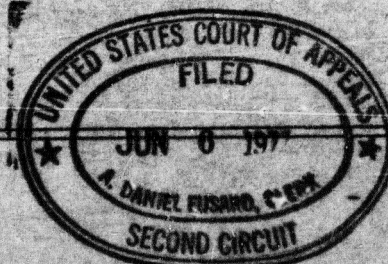


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	11
PRELIMINARY STATEMENT	1
COUNTER-STATEMENT OF THE ISSUES PRESENTED	2
COUNTER-STATEMENT OF THE CASE	4
ARGUMENT	14
I CHIEF JUDGE MISHLER DID NOT ABUSE HIS DISCRETION IN NOT PERMITTING A SECOND AMENDMENT ON THE EVE OF TRIAL INTRODUCING ISSUES NOT RAISED BEFORE AND ASSERTING FUTILE CLAIMS	14
A. Allowing the second amendment would have unduly delayed the trial of the action	15
B. Halder's long-delayed amendments, if permitted, would have caused IBM unwarranted prejudice	18
C. Since the proposed amendments would not have withstood a motion to dismiss, their inclusion would have been futile	20
D. Halder's belated excuse for the untimeliness of his motion to amend is disingenuous	24
II CHIEF JUDGE MISHLER DID NOT ABUSE HIS DISCRETION IN DENYING HALDER'S MOTION TO COMPEL PRODUCTION OF HUNDREDS OF THOUSANDS OF DOCUMENTS IRRELEVANT TO THE ISSUES	26
A. Halder's request for production of documents was fatally overbroad and oppressive, and sought irrelevant information	27
B. Judge Mishler, finding Halder's document request "harassment," properly denied his motion to compel production	30

III HALDER'S PERSISTENT PROSECUTION OF TOTALLY MERITLESS APPEALS WARRANTS AN AWARD OF ATTORNEYS' FEES AND DOUBLE COSTS	33
CONCLUSION	34

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>Page</u>
<u>Accardi v. United States</u> , 356 F. Supp. 218 (S.D.N.Y. 1973)	21
<u>Arnold v. Tiffany</u> , 359 F. Supp. 1034 (C.D. Cal. 1973), <u>aff'd</u> , 487 F.2d 216 (9th Cir.), <u>cert. denied</u> , 415 U.S. 984 (1974)	22
<u>Baker v. F & F Investment</u> , 470 F.2d 778, 781 (2d Cir. 1972), <u>cert. denied</u> , 411 U.S. 966 (1973)	26
<u>Barr v. WUI/TAS, Inc.</u> , 66 F.R.D. 109 (S.D.N.Y. 1975)	21
<u>Choate v. Caterpillar Tractor Co.</u> , 402 F.2d 357 (7th Cir. 1968)	23
<u>DeLuca v. Atlantic Refining Co.</u> , 176 F.2d 421, 424-25 (2d Cir. 1949)	21
<u>Dent v. St. Louis - San Francisco Ry. Co.</u> , 406 F.2d 399 (5th Cir. 1969)	23
<u>Dolgow v. Anderson</u> , 53 F.R.D. 661 (E.D.N.Y. 1971)	31
<u>Espinoza v. Farah Manufacturing Co.</u> , 414 U.S. 86, 95 (1973)	23
<u>Fluoro Electric Corp. v. Branford Associates</u> , 489 F.2d 320 (2d Cir. 1973)	34

Page

<u>Foman v. Davis</u> , 371 U.S. 178, 182 (1962)	14, 15, 21
<u>Freeman v. Continental Gin Co.</u> , 381 F.2d 459, 469 (5th Cir. 1967)	18
<u>Friedman v. Chesapeake and Ohio R. Co.</u> , 261 F. Supp. 728, 734 (S.D.N.Y. 1966), <u>aff'd</u> , 395 F.2d 663 (2d Cir. 1968), <u>cert. denied</u> , 393 U.S. 1016 (1969)	21
<u>H.L. Moore Drug Exchange, Inc. v. Smith Kline & French Laboratories</u> , 384 F.2d 97 (2d Cir. 1967)	26
<u>Halder v. Avis Rent-A-Car System, Inc.</u> , Dkt. No. 76-7507 (2d Cir., April 12, 1977)	5, 34
<u>Halder v. Informatics, Inc. et ano.</u> , Dkt. No. 76-7147 (2d Cir., Nov. 15, 1976)	5, 6, 33, 34
<u>Halder v. Quotron Systems, Inc.</u> , Dkt. No. 76-7146 (2d Cir., Nov. 15, 1976)	5, 6, 33, 34
<u>Halder v. RCA Corporation</u> , 74 C 1375 (E.D.N.Y. April 25, 1975)	5, 22
<u>Halder v. Sperry Rand Corp.</u> , Dkt. No. 76-7145 (2d Cir., Nov. 15, 1976)	5, 6, 33, 34
<u>Hale v. Ralston Purina Co.</u> , 432 F.2d 156, 159 (8th Cir. 1970)	14
<u>Harlem River Consumers Cooperative, Inc. v. Associated Grocers of Harlem, Inc.</u> , 54 F.R.D. 551, 553 (S.D.N.Y. 1972)	31
<u>Hudson v. International Business Machines Corp.</u> , 9 EPD ¶9991 (S.D.N.Y. 1975)	22
<u>Izaak Walton League of America v. St. Clair</u> , 497 F.2d 849, 854 (8th Cir.), <u>cert. denied</u> , 419 U.S. 1009 (1974)	17
<u>Johnson v. Partrederiet Brovigtank</u> , 202 F. Supp. 859, 867 (S.D.N.Y. 1962)	21
<u>Johnson v. Sales Consultants, Inc.</u> , 61 F.R.D. 369, 372 (N.D. Ill. 1973)	16

	<u>Page</u>
<u>Jones v. Alfred H. Mayer, Co.</u> , 392 U.S. 409 (1968) . . .	22
<u>Jones v. Metzger Dairies, Inc.</u> , 334 F.2d 919, 925-26 (5th Cir. 1964), <u>cert. denied</u> , 379 U.S. 965 (1965)	14
<u>Komie v. Buehler Corp.</u> , 449 F.2d 644, 647 (9th Cir. 1971)	14
<u>Lehigh Valley Industries, Inc. v. Birenbaum</u> , 527 F.2d 87, 93 (2d Cir. 1975)	26
<u>Leonard v. National Labor Relations Board</u> , 205 F.2d 355 (2d Cir. 1953)	16
<u>Lewis v. Texaco Inc.</u> , 527 F.2d 921, 926 (2d Cir. 1975) .	26
<u>New Sanitary Towel Supply, Inc. v. Consolidated Laundries Corp.</u> , 24 F.R.D. 186, 189 (S.D.N.Y. 1959)	31
<u>Oscar Gruss & Son v. Lumbermens Mutual Casualty Co.</u> , 422 F.2d 1278 (2d Cir. 1970)	34
<u>Philadelphia Hous. A. v. American Radiator & S. San. Corp.</u> , 309 F. Supp. 1057, 1064 (E.D. Pa. 1969)	21
<u>Principe v. United States</u> , 207 F. Supp. 301 (E.D.N.Y. 1962)	21
<u>PSG Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.</u> , 417 F.2d 659, 664 (9th Cir. 1969), <u>cert. denied</u> , 397 U.S. 918 (1970)	17
<u>Rogers v. Valentine</u> , 306 F. Supp. 34 (S.D.N.Y. 1969), <u>aff'd</u> , 426 F.2d 1361 (2d Cir. 1970)	17
<u>Tramble v. Converters Ink Co.</u> , 343 F. Supp. 1350 (N.D. Ill. 1972)	22
<u>Troxel Manufacturing Co. v. Schwinn Bicycle Co.</u> , 489 F.2d 968, 970 (6th Cir. 1973), <u>cert. denied</u> , 416 U.S. 939 (1974)	14, 17
<u>United States ex rel. Edelstein v. Brussell Sewing Mach. Co., Inc.</u> , 3 F.R.D. 87 (S.D.N.Y. 1943)	31

Page

United States Fidelity and Guaranty Co. v. United States,
389 F.2d 697, 98 (10th Cir. 1968) 14

United States v. Levine, 185 F. Supp. 889 (E.D.N.Y.
 1955) 21

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S.
 321, 330, reh. denied, 401 U.S. 1015 (1971) 14

STATUTES:

Civil Rights Act of 1866,
 42 U.S.C. §1981 7, 22

Civil Rights Act of 1964,
 42 U.S.C. §2000-e, et seq. 4

FEDERAL RULES OF APPELLATE PROCEDURE:

Rule 38 2, 3, 33

FEDERAL RULES OF CIVIL PROCEDURE:

Rule 15(a) 15

Rule 26(c) 31

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-against-

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BRIEF ON BEHALF OF DEFENDANT-APPELLEE

PRELIMINARY STATEMENT

Plaintiff-appellant Biswanath Halder appeals from the judgment dismissing the complaint entered December 23, 1976, in the United States District Court for the Eastern District of New York after trial before the Honorable Jacob Mishler (D42)*. On the day set for trial, Halder had refused

* IBM adopts Halder's method of referring to the record. "D__" refers to the entry number of the document in question on the docket sheet in Halder v. International Business Machines Corp., 74-C-1377 (E.D.N.Y., filed September 25, 1974).

to offer any evidence in support of his case, asserting that the decision and order of Judge Mishler dated December 16, 1976 (D41), denying his motion to compel defendant-appellee International Business Machines Corporation ("IBM") to produce documents, compile lists and prepare computer printouts was erroneous. Halder seeks review of that order. Halder also appeals from the decision and order dated November 22, 1976 (D38), denying his motion for leave to amend the complaint for a second time.

IBM moves pursuant to Rule 38 of the Federal Rules of Appellate Procedure for an award of double costs and of the attorneys' fees incurred as a result of this meritless appeal on substantially the same issues decided against Halder in prior appeals of four other actions.

COUNTER-STATEMENT OF THE ISSUES PRESENTED

I. Where plaintiff moved further to amend the amended complaint seventeen months after the first amendment and five months after the District Court had directed the parties expeditiously to complete their trial preparation, where the proposed amendment sought to add to plaintiff's original national origin discrimination claim, individual and class claims of discrimination based on color, religion

and alienage, together with a claim of alleged retaliation, and where plaintiff failed to state any newly-discovered facts to support the new charges, did the District Court abuse its discretion denying plaintiff's motion to amend?

II. Where plaintiff, having already received information from defendant through pre-trial disclosure, sought additional irrelevant and burdensome discovery, refused to review documents produced by defendant pursuant to an order of the District Court, then sought to evade the District Court's order limiting the documents defendant was ordered to produce and harassed the defendant with burdensome and overbroad disclosure requests, did the District Court abuse its discretion in denying plaintiff's motion to compel production of additional documents not covered by its prior order?

III. Whether defendant-appellee is entitled to an award of damages, including its attorneys' fees, and double costs pursuant to Rule 38 of the Federal Rules of Appellate Procedure on the ground that this appeal, the most recent in a series of uniformly unsuccessful appeals in virtually identical actions, is patently meritless?

COUNTER-STATEMENT OF THE CASE

This action is the continuation of proceedings Halder began before the Equal Employment Opportunity Commission ("EEOC") in 1971 in which he charged, unsuccessfully, that IBM had declined to offer him employment as a computer programmer or analyst because of his Indian national origin (D23, Exh. F). The action was commenced on September 25, 1974.

The original complaint (D2) was little more than a typewritten form containing blanks to be checked or completed, and it incorporated the charge Halder had filed with the EEOC. Despite its skeletal format, the complaint set forth the essence of Halder's claim. Purely and simply, Halder alleged that he was discriminated against in violation of Title VII of the Civil Rights Act of 1964 because he came from India.

The form of complaint and the EEOC charge listed all available grounds of unlawful discrimination, and Halder was asked to make a mark opposite the ground or grounds on which he believed he was discriminated against. On both forms Halder checked the space opposite the words "national origin." On neither did he make any mark in the places designating race, color, sex or religion. Although he now

claims (Brief for Plaintiff-Appellant, at 5) that he thought "national origin" encompassed three other bases of discrimination set forth on the EEOC charge and the form of complaint, it is evident from a narrative statement Halder annexed to the original complaint that he only claimed one type of discrimination had occurred. After describing his alleged difficulty in finding work, he wrote:

Only one conclusion can be drawn
Specifically, I charge that the denial
[of employment] is made on grounds of
discrimination relating to my national
origin. (D2, emphasis added.)

In January 1975 Halder received permission to amend the complaint (D9). The amendment listed 14 instances on which Halder unsuccessfully applied for employment at one or another of IBM's facilities in four states in 1968, 1969, 1970 and 1974 (D5, p.2-4). The gravamen of his amended complaint, however, remained the same; he charged that he was discriminated against because of his Indian national origin. No other ground was stated.

By letter dated February 5, 1976, Chief Judge Mishler directed counsel in eight actions* brought by Halder

* Halder v. Sperry Rand Corp., 74-C-1069; Halder v. Quotron Systems, Inc., 74-C-1376; Halder v. I.B.M., 74-C-1377; Halder v. General Tel. & Elec., 74-C-1531; Halder v. ITT Corporation, 74-C-1532; Halder v. Avis Rent-A-Car, 74-C-1552; Halder v. Informatics, Inc., et ano., 75-C-925; Halder v. Litton Industries, 75-C-1761. Halder also had commenced an action against RCA, Halder v. RCA Corp., 74-C-1375.

to appear for trial on February 10, 1976 (D15). The Sperry Rand, Quotron and Informatix actions were tried that day, but pre-trial discovery was not completed in the other actions. Judge Mishler therefore directed that all parties in the other actions promptly complete pre-trial discovery and be ready to be called for trial.

After receiving Judge Mishler's order to complete discovery, IBM answered or objected to interrogatories Halder had served (D18). As part of their trial preparation,* IBM's attorneys also analyzed data maintained by the EEOC, the Immigration and Naturalization Service, the Department of Labor and the Department of Commerce in order to obtain statistics relating both to the Asian-Indian population of this country and to the number of professional and non-professional immigrants from India who came to this country during the time plaintiff sought employment with IBM. In addition, to ascertain the make-up of IBM's employee population IBM conducted an analysis of nearly 8,000 employees at one of the facilities at which Halder had twice applied for employment to obtain the number of Indian professional and

* The details of IBM's trial preparation are set forth in the affidavit of Kenneth J. Kelly, sworn to August 3, 1976, in opposition to Halder's motion to amend the amended complaint (D23/24).

nonprofessional employees. Comparisons between the national figures and the IBM figures were made that revealed more than three percent of IBM's professional level employees were of Indian extraction, a ratio one hundred times greater than that of the national population (D46, p. 29-31). IBM also took Halder's deposition; that deposition focussed on his claim of discrimination on the basis of his Indian national origin (D17, 19).

In the summer of 1976, months after Judge Mishler had ordered that pre-trial proceedings be expeditiously concluded, Halder made two motions. One sought leave to amend the complaint for a second time (D21). Whereas for the previous two years (and before the EEOC) he had alleged national origin discrimination in violation of Title VII, the proposed amended complaint sought to transform the action into a searching examination of all of IBM's hiring practices and to add new grounds of alleged discrimination.

Specifically, Halder sought to assert claims under the Civil Rights Act of 1866, 42 U.S.C. §1981, and the Declaratory Judgments Act. He charged IBM with "intentionally" engaging in unlawful employment "policies and practices" and with maintaining a recruiting and hiring system, "the design, intent and purpose" of which was to limit the employment opportunities of all persons of Indian national origin

because of their "color, religion and/or alienage." Furthermore, Halder expanded the alleged bases of IBM's claimed discrimination against himself. Although since 1971 he had maintained that IBM had discriminated against him because of his national origin, he charged that such alleged discrimination was also based on his color, religion and alienage. In addition, he claimed that IBM had unlawfully retaliated against him in violation of Title VII because he "has opposed the unlawful employment policies and practices of [IBM] and other employers in the computer industry." Finally, in a transparent attempt to lend weight and significance to his claims, Halder alleged that IBM's alleged unlawful employment practices and policies have caused injury to plaintiff "and other persons similarly situated."

The second motion sought to compel IBM to answer six interrogatories to which it had objected (D20). The interrogatories (D8) sought information regarding each advertisement for programmers IBM placed over a six year period, the complete education and employment history of every programmer employed by IBM since June 1, 1969, facts regarding every discrimination action or administrative proceeding involving IBM, and the result of every unsuccessful application made to IBM by any member of a "minority race, ethnic group, religious group or national origin

[sic]" since June 1969. None of the information sought by the interrogatories related to plaintiff's claims, and to respond to them would have cast immense burdens on IBM. IBM therefore vigorously opposed Halder's Rule 37 motion.

A hearing on plaintiff's two motions was had on August 6, 1976. During that hearing, Halder agreed to withdraw his Rule 37 motion in exchange for personnel data regarding IBM's programmers, and Judge Mishler suggested that IBM produce personnel files from one of its facilities. Following Judge Mishler's compromise suggestion, IBM offered Halder all of the personnel files at IBM's East Fishkill, New York, facility (where the employee population analysis had been performed), together with personnel files of persons formerly employed at that facility.* By order dated August 18, 1976 (D28), Judge Mishler directed that those documents be produced. Although Halder had seen a copy of the order before it was entered, at no time did he object to it.

Notwithstanding Judge Mishler's order, and without even seeing the documents IBM tendered, in a letter sent a week after the hearing Halder "demanded" (1) a chronological

* The facts relating to IBM's tender of documents to Halder, and his subsequent rejection of that tender, are set forth in the affidavit of Kenneth J. Kelly, sworn to December 1, 1976, in opposition to Halder's motion to compel production of documents (D39).

listing of "all the computer engineers, programmers and analysts hired from June 1, 1969 to date," (2) "advertisements . . . and . . . all other documents including employment requests furnished to employment agencies" for all such persons for the same time period, (3) a "computer printout" listing all such persons currently employed, together with their "date of hiring, present position and salary," and (4) "computer printouts of employee payrolls" from June 1, 1969 to date. That demand, which Halder also sent to the Court, substantially duplicated the interrogatories Halder had withdrawn and went far beyond the scope of Judge Mishler's order. Accordingly, IBM's counsel promptly advised Halder that the documents described in the court's August 18 order, and only those documents, would be available for his inspection at East Fishkill.

Halder arrived at East Fishkill to inspect the documents and was told that the documents he had "demanded" would not be produced. He then skimmed a few files, refused to proceed further and left.

Having refused to review the files IBM tendered and in disregard of Judge Mishler's order governing discovery, Halder promptly served a demand for documents (D31) that

repeated verbatim the "demands" in the letter he had sent to IBM. In addition, the demand called for the production of employment applications, resumes and other documents of "each and every computer engineer, programmer and analyst hired" from June 1, 1969 to date. It was not limited, however, to East Fishkill; Halder wanted documents covering a seven year period from each of the eight facilities at which he had sought employment since June 1, 1969, irrespective of the date on which any such application had been made. IBM objected to the request and declined to produce any documents or to prepare lists or printouts (D36). Halder then moved to compel production of the documents, lists and printouts (D37).

Judge Mishler denied Halder's motions to amend the complaint for a second time (D38) and to compel the production of the documents listed in Halder's document demand (D41). He directed that the parties appear for trial on December 22, 1976.

When the case was called for trial, Halder flatly refused to put on his case (D46, p. 2-3). Ignoring completely IBM's tender of documents pursuant to Judge Mishler's order, he stated that IBM had "refused to give me the com-

petent evidence with the full support and approval of the court" (D46, p.2-3). Judge Mishler gave Halder a clear warning of the consequences of Halder's refusal to proceed:

THE COURT: I say that the defendant has complied with the demands that were fairly made of it and that the insistent and continuous and repeated demands by plaintiff for evidence requiring extensive research and the expenditure of vast amounts of money constituted a harassment.

The plaintiff has no just reason for not proceeding.

I am ready to declare a default if the plaintiff refuses to proceed. (D46, p.4.)

Halder still refused. At Judge Mishler's direction, IBM offered the testimony of its Director of Personnel Research, whom Halder cross-examined. At the close of the evidence, Judge Mishler dismissed the complaint and made the following findings and conclusions:

I find that the failure and refusal of the plaintiff to proceed with his case is just a ploy to further delay the ultimate result and that no sound purpose will be served by or in any way delaying this trial.

I further find that the defendant has affirmatively shown that the failure to hire Mr. Halder was not on grounds of discrimination or on national origin.

I find the evidence shows that Mr. Halder was not hired because he did not meet the job description, or as used in the testimony of Mr. Hawkins, he was not competitive.

I find that management has shown there were no discriminatory policies based on race, color, creed or national origin in existence at IBM.

The complaint is dismissed. (D46, p.46-47.)

Halder now appeals, not claiming that the evidence did not support Judge Mishler's findings, but that he should have been permitted to amend the complaint for a second time and that he was wrongfully denied pre-trial discovery.

Argument

I

CHIEF JUDGE MISHLER DID NOT ABUSE
HIS DISCRETION IN NOT PERMITTING
A SECOND AMENDMENT INTRODUCING ON
THE EVE OF TRIAL ISSUES NOT RAISED
BEFORE AND ASSERTING FUTILE CLAIMS

It is well settled that "the grant of leave to amend the pleadings pursuant to Rule 15(a) is within the discretion of the trial court." Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330, reh. denied, 401 U.S. 1015 (1971); Foman v. Davis, 371 U.S. 178, 182 (1962). It is equally clear that the allowance of or refusal to permit an amendment is not subject to review on appeal except for abuse of discretion. Troxel Manufacturing Co. v. Schwinn Bicycle Co., 489 F.2d 968, 970 (6th Cir. 1973), cert. denied, 416 U.S. 939 (1974); Komie v. Buehler Corp., 449 F.2d 644, 647 (9th Cir. 1971); Hale v. Ralston Purina Co., 432 F.2d 156, 159 (8th Cir. 1970); United States Fidelity and Guaranty Co. v. United States, 389 F.2d 697, 698 (10th Cir. 1968); see 3 Moore's Federal Practice ¶15.08[4] at 895.

The allowance of amendments is a matter within the sound discretion of the trial court, and denial of a motion to amend will not be disturbed on appeal unless there has been a clear abuse of discretion. Jones v. Metzger Dairies, Inc., 334 F.2d 919, 925-26 (5th Cir. 1964), cert. denied, 379 U.S. 965 (1965).

Judge Mishler's ten-page opinion (D38) denying Halder's motion to amend the complaint for a second time demonstrates that he gave thoughtful consideration to the motion, both weighing the prejudicial effect granting the motion would have on IBM and analyzing all of the applicable law pertaining to the new claims Halder sought to include in the proposed second amended complaint. Well aware of the direction of Rule 15(a) that leave to amend be freely given when justice so requires, Judge Mishler also recognized the grounds enumerated by the Supreme Court in Foman v. Davis, supra, for denying a motion for leave to amend, namely:

undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. . . . Foman v. Davis, supra, at 182.

It is manifest that the Chief Judge was correct in concluding that the proposed second amended complaint suffered from all of these infirmities. Leave to amend was properly denied.

A. Allowing the second amendment would have unduly delayed the trial of the action.

Judge Mishler first noted that Halder failed to offer a single reason why the proposed amendments had not

been included in the first motion to amend made seventeen months before (D38, p.4). The lack of any justification for the sudden appearance of totally different claims, compounded by the fact that Halder waited until the eve of trial to move to amend the complaint for a second time - after pre-trial discovery has been completed, after IBM's trial preparation has been concluded, and after the complaint had already been amended once - constituted sufficient ground in itself to deny the motion. Leonard v. National Labor Relations Board, 205 F.2d 355 (2d Cir. 1953); Johnson v. Sales Consultants, Inc., 61 F.R.D. 369, 372 (N.D. Ill. 1973). Extensive additional pre-trial discovery and trial preparation would have been necessary both to meet Halder's newly-fashioned charges of retaliation and unlawful discrimination due to color, religion and alienage and to rebut his indictment of IBM's entire hiring and employment system. That preparation would have postponed for a substantial time the trial that the Chief Judge had wanted to hold five months before.

Where the District Court, in its discretion, denied a motion to amend made just prior to trial because the amendment would introduce new issues and would cause extensive delay by necessitating additional discovery and preparation, federal appellate courts have found that discretion properly exercised.

Where, as here, a motion to amend is made--nineteen months after the complaint had been filed and served and about one month before trial was set to begin--and where an entirely new and different cause of action, involving complicated legal and factual issues requiring extensive discovery and preparation for trial, is alleged--we can find no abuse of discretion [in denying leave to amend.] PSG Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 417 F.2d 659, 664 (9th Cir. 1969), cert. denied, 397 U.S. 918 (1970).

And, again, in another case where the delay in seeking permission to amend was about the same as in this action, the Court of Appeals for the Eighth Circuit stated:

The original cross-claim by the State was filed March 9, 1970. The case was progressing towards trial The State did not file its motion to amend until August 19, 1971, some 17 months after its original pleading. This claim of the State injected new issues . . . [that] would have required extensive preparation and consumed voluminous amounts of trial time to the detriment of a speedy resolution of the case. The refusal to allow amendment is affirmed. Izaak Walton League of America v. St. Clair, 497 F.2d 849, 854 (8th Cir.), cert. denied, 419 U.S. 1009 (1974).

See also Troxel Manufacturing Co. v. Schwinn Bicycle Co., supra; Rogers v. Valentine, 306 F. Supp. 34 (S.D.N.Y. 1969), aff'd, 426 F.2d 1361 (2d Cir. 1970). Judge Mishler was clearly well advised to follow the admonition of the Court of

Appeals for the Fifth Circuit:

A busy district court need not allow itself to be imposed upon by the presentation of theories seriatim. Liberality in amendment is important to assure a party a fair opportunity to present his claims and defenses, but "equal attention should be given to the proposition that there must be an end finally to a particular litigation." Freeman v. Continental Gin Co., 381 F.2d 459, 469 (5th Cir. 1967).

Since Halder did not set forth any newly-discovered facts or circumstances justifying adding on the eve of trial allegations of retaliation and of discrimination on the grounds of color, religion and alienage, Judge Mishler properly denied his motion to amend.

B. Halder's long-delayed amendments, if permitted, would have caused IBM unwarranted prejudice.

Not only were the proposed amendments untimely, but as Judge Mishler correctly observed, they would have caused IBM largely to duplicate its trial preparation. All of IBM's trial preparation had been aimed at rebutting Halder's assertion that he had been denied employment on separate occasions in 1969, 1970 and 1974 because of his national origin. The new charges of discrimination due to his color, religion and alienage and of retaliation because of his EEOC proceeding

would have required IBM begin its preparation anew at significant cost and inconvenience.

IBM believed the action to be wholly without merit and that the EEOC had correctly determined after investigation that Halder did not have a valid claim. Nevertheless, IBM's trial preparation was thorough and extensive. For example, IBM had analyzed the employee population working at one of the facilities to which Halder sent an application for employment in order to determine the number of employees of Indian national origin and learned that more than three percent of its professional employees were of Indian extraction. A further analysis to determine the number of aliens or persons of similar color as Halder (e.g., other persons from the Indian sub-continent or Middle-eastern areas) could have been done at the same time had Halder timely moved to amend. The Chief Judge was correct in not requiring IBM painstakingly to review the same material to meet Halder's newly-asserted claims.

Further, in order to obtain statistics to compare to the figures from the "sample" facility, a paralegal assistant employed by counsel spent one full week analyzing statistics maintained by the EEOC, the Immigration and

Naturalization Service, the Department of Labor and the Department of Commerce. The statistics collected during that week were necessarily limited to subjects directly related to immigration from India since 1969 and to the number of persons of Asian Indian descent in this country. To locate and review statistical compilations for the other categories set forth in the proposed second amended complaint would have resulted in massive duplication of effort.

Chief Judge Mishler recognized the immense burdens and duplication that the amendment would necessitate, and noted that although Halder had had three opportunities, once before the EEOC and twice in the District Court, to expand his claims, he had failed to do so. To permit the amendments on the eve of trial would have caused IBM undue prejudice. The motion was properly denied.

C. Since the proposed amendments would not have withstood a motion to dismiss, their inclusion would have been futile.

Chief Judge Mishler did not confine his review of Halder's motion for leave to amend to the unfavorable effects granting the motion would have on his calendar and on IBM and its attorneys. The majority of his opinion consists

of a thorough legal analysis of each aspect of Halder's proposed second amended complaint. That analysis is in all respects correct.

The Chief Judge started from the proposition, alluded to by the Supreme Court in Foman v. Davis, supra, that a proposed amendment that is insufficient as a matter of law should not be permitted.

Where leave to amend is sought to assert claims devoid of legal foundation, it should be denied, particularly where as here, the statement of claims in the complaint is the stepping-off point for very far-reaching discovery. Philadelphia Hous. A. v. American Radiator & S. San. Corp., 309 F. Supp. 1057, 1064 (E.D. Pa. 1969).

See also DeLuca v. Atlantic Refining Co., 176 F.2d 421, 424-25 (2d Cir. 1949) (denial of motion to amend to assert new claims barred by the statute of limitations) (L. Hand, Ch.J.); Barr v. WUI/TAS, Inc., 66 F.R.D. 109 (S.D.N.Y. 1975); Accardi v. United States, 356 F. Supp. 218 (S.D.N.Y. 1973); Friedman v. Chesapeake and Ohio R. Co., 261 F. Supp. 728, 734 (S.D.N.Y. 1966), aff'd, 395 F.2d 663 (2d Cir. 1968), cert. denied, 393 U.S. 1016 (1969); Principe v. United States, 207 F. Supp. 301 (E.D.N.Y. 1962); Johnson v. Partrederiet Brovigtank, 202 F. Supp. 859, 867 (S.D.N.Y. 1962); United States v. Levine, 185 F. Supp. 889 (E.D.N.Y. 1955).

First, Halder's attempt to assert on the basis of the Civil Rights Act of 1866, 42 U.S.C. §1981, claims of retaliation and of discrimination due to religion, color, alienage and national origin was quickly, and properly, disposed of as futile, since that statute is limited to claims of racially-motivated discrimination. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Arnold v. Tiffany 359 F. Supp. 1034 (C.D. Cal. 1973), aff'd, 487 F.2d 216 (9th Cir.), cert. denied, 415 U.S. 984 (1974); Halder v. RCA Corporation, 74 C 1375 (E.D.N.Y. April 25, 1975); Hudson v. International Business Machines Corp., 9 EPD ¶9991 (S.D.N.Y. 1975) (retaliation claim not maintainable under Section 1981); Tramble v. Converters Ink Co., 343 F. Supp. 1350 (N.D. Ill. 1972). The only basis of discrimination available under Section 1981, discrimination due to race, was carefully omitted from the proposed second amended complaint. Clearly, then, Chief Judge Mishler was correct in denying any amendment asserting new claims based on the 1866 Civil Rights Act that did not allege discrimination based on race.

In addition, the Chief Judge recognized the well-established rule that before a plaintiff may bring an action to redress alleged violations of Title VII he must assert those claims before the EEOC. Failure to do so deprives the court

of subject matter jurisdiction. Dent v. St. Louis - San Francisco Ry. Co., 406 F.2d 399 (5th Cir. 1969); Choate v. Caterpillar Tractor Co., 402 F.2d 357 (7th Cir. 1968). Since the Title VII claims Halder sought to add were not asserted before the EEOC, the District Court lacked jurisdiction over them.

Judge Mishler reviewed the contents of the charge Halder submitted to the EEOC (in which he only identified "national origin" as the basis for the alleged discrimination), the EEOC's "Notice of Charge of Employment Discrimination" (which repeated that single ground) and the EEOC's determination that there was not cause to believe that IBM "did not hire him . . . because of his national origin (Indian)." He correctly determined from the EEOC record itself - supported by Halder's original and amended complaints in this action - that discrimination on the basis of religion, color and alienage, and assertions of retaliation, were not investigated by the EEOC or within the scope of the EEOC's investigation. Accordingly, the proposed new claims were not within the District Court's jurisdiction. They were properly excluded from the case.

Judge Mishler also noted that the Supreme Court had held in Espinoza v. Farah Manufacturing Co., 414 U.S. 86, 95 (1973), that the proposed claim of discrimination due

to alienage was not cognizable under Title VII. Further, he described Halder's attempt to expand the scope of the action by converting it into a class action as improper, since the allegations of the complaint were too broad to form the basis of a manageable class action and since Halder, proceeding pro se, could not adequately represent the supposed class' interests.

A reading of Judge Mishler's opinion amply demonstrates that his determination not to permit the amendment was based on careful legal analysis. That determination should be affirmed.

D. Halder's belated excuse for the untimeliness of his motion to amend is disingenuous.

Halder only now proffers a reason why he waited until the eve of trial to put forth his expanded second amended complaint. He claims (Brief, at 5) that he assumed when he checked the box on the EEOC complaint form to designate "national origin" discrimination, that designation also encompassed two of the other bases, "race or color" and "religious creed," even though they were separately provided for on the same line of the form. Similarly, he asserts that when he checked the line opposite the words

"your natinal origin" on the form of complaint used in September 1974, he thought that designation included "your color" and "your religion," two other, separate designations that Halder could have checked. This "excuse" is patently specious, especially coming from a college graduate who prides himself on his professional background. Further, it is flatly contradicted by the narrative statement Halder annexed to his original complaint, in which he stated "specifically" that his suit arose from national origin discrimination. It does not merit further comment.

II

CHIEF JUDGE MISHLER DID NOT ABUSE HIS
DISCRETION IN DENYING HALDER'S MOTION
TO COMPEL PRODUCTION OF HUNDREDS OF
THOUSANDS OF DOCUMENTS IRRELEVANT
TO THE ISSUES

It is a fundamental principle that the discovery rules of the Federal Rules of Civil Procedure "vest broad discretion in the trial court" regarding management of pre-trial discovery and that the court's exercise of discretion "should not be overruled without a showing of abuse."

Lehigh Valley Industries, Inc. v. Birenbaum, 527 F.2d 87, 93 (2d Cir. 1975); Lewis v. Texaco, Inc., 527 F.2d 921, 926 (2d Cir. 1975); H.L. Moore Drug Exchange, Inc. v. Smith, Kline & French Laboratories, 384 F.2d 97 (2d Cir. 1967).

The law in this area is clearly stated. A motion seeking a discovery ruling is addressed to the discretion of the district court, and our function on appeal is to determine whether the trial judge abused his discretion in entering the challenged order [citations]. Baker v. F & F Investment, 470 F.2d 778, 781 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973).

Thus, it is incumbent on Halder clearly to demonstrate that Judge Mishler abused his discretion in denying his motion to compel production of documents. He has failed to do so. His brief on appeal, albeit replete with

generalities, does not set forth a single fact justifying this Court overturning Judge Mishler's order; indeed, no such facts exist. The record amply supports Judge Mishler's finding that Halder's request for documents was made for purposes of delay and harrassment and that the documents, computer printouts and lists Halder sought were not relevant to any issue in the action.

A. Halder's request for production of documents was fatally overbroad and oppressive, and sought irrelevant information.

Although the issues to be tried in this non-class action were far from complex, Halder's disclosure requests were not aimed at those issues.

First, the scope of the Rule 34 request demanded production of documents from IBM facilities for time periods several years before and after the date on which he had applied for a position. The request sought documents "for each and every facility of [IBM] where plaintiff sought employment" for the entire period from June 1, 1969 to the date of the request, September 25, 1976, although Halder had only applied to IBM in three of those seven years.

In its opposition papers and at trial (D46, p.17), IBM established that it conducts its hiring function separately at each of its facilities. Consequently, any information regarding hiring at one facility would not have any bearing on an application submitted to another facility. As a result, in addition to being fatally overbroad, the request sought hundreds of thousands of documents irrelevant to any claim Halder made, and Judge Mishler so found.

Each paragraph of the request, in addition to being overbroad in its demand for seven years' worth of documents, suffered from one or more infirmities.

- Request 1 demanded that IBM prepare a list, in chronological order, of all computer programmers, engineers and analysts hired from June 1, 1969 to September 1976. In addition to being fatally overbroad, it sought to require the preparation of documents not even in existence.

- Request 2 demanded the production of the employment applications of every computer engineer, programmer and analyst hired during the same seven year period, irrespective of whether such persons had been hired for the same position for which Halder may have applied or for a position requiring greater or lesser experience.

- Request 3 demanded that IBM make a computer printout of each computer engineer, programmer and analyst employed in September 1976, setting forth his then-current position and salary, and when he was hired. Halder never explained why such current information, not even maintained in existing documents, was relevant to his claim.

- Request 4 demanded every advertisement and "all other documents" used by IBM from June 1, 1969 for recruiting computer engineers, programmers and analysts, irrespective of where in the United States the advertisements were placed, or whether Halder had even seen them. This request, in addition to being burdensome and irrelevant, asked that IBM produce documents which Halder already had in his possession, and which had been marked as exhibits during his deposition (D19).

- Request 5 demanded that IBM prepare computer printouts of "employee payroll" for the same seven year time period; that "payroll" was not even limited to computer programmers and analysts.

The vast number of documents Halder requested and the information in the computer runs Halder wanted IBM to create did not pertain to the issues in the action, and

Judge Mishler properly denied Halder's Rule 37 motion in its entirety.

B. Judge Mishler, finding Halder's document request "harrassment," properly denied his motion to compel production.

In addition to holding that Halder's Rule 34 request sought irrelevant documents, Judge Mishler found that it "must be considered harrassment." The record of Halder's refusal to take advantage of the discovery offered, coupled with the "extremely broad range of documents" demanded (D41, p.2), supports that finding.

Judge Mishler did not deny Halder's Rule 37 motion in the dark. He was aware that Halder refused to review the documents IBM collected and tendered pursuant to his August 18, 1976 order. He was aware of Halder's attempt to expand this action to include without any legitimate justification claims never before asserted in the District Court or before the EEOC. Significantly, the Chief Judge presided over the eight other actions brought by Halder in the Eastern District alleging national origin discrimination against other computer manufacturers and was completely familiar with Halder's conduct of those actions.

It is clear that the disclosure rules are designed to "provide an orderly, efficient and effective means for ascertaining the truth in order to expedite a determination of the controversy on the merits." Harlem River Consumers Cooperative, Inc. v. Associated Grocers of Harlem, Inc., 54 F.R.D. 551, 553 (S.D.N.Y. 1972). However, where a litigant such as Halder attempts to abuse his right to utilize the discovery provided by the Federal Rules, the Court has broad powers to curtail discovery. Dolgow v. Anderson, 53 F.R.D. 661 (E.D.N.Y. 1971); United States ex rel. Edelstein v. Brussell Sewing Mach. Co., 3 F.R.D. 87 (S.D.N.Y. 1943). Indeed, the Federal Rules empower the Court to make "any" order, even that "discovery not be had" at all, if the discovery sought would result in "annoyance, embarrassment, oppression, or undue burden or expense." Rule 26(c).

The Courts, in harmony with the spirit of the Rules, have applied them with liberality, but such a policy does not justify an examination which can serve no useful purpose in furthering [a party's] cause other than to afford an opportunity to vex and harass an opposing litigant. New Sanitary Towel Supply, Inc. v. Consolidated Laundries Corp., 24 F.R.D. 166, 189 (S.D.N.Y. 1959).

Halder was not denied discovery. The interrogatories he served in February 1975 (D8) and the supplementary

interrogatories he served in August 1976 (D29), insofar as they were proper, were fully answered (D18, D35). In addition, Halder was permitted to review the IBM personnel files he admitted gave him the information he said he needed. He cannot now be heard to complain when, having grossly overstepped the limits of the permitted disclosure, he has been properly denied irrelevant, burdensome and harassing disclosure (D41). In such circumstances, Judge Mishler's denial of his motion to compel production was entirely proper.

III

HALDER'S PERSISTENT PROSECUTION OF TOTALLY
MERITLESS APPEALS WARRANTS AN AWARD OF
ATTORNEYS' FEES AND DOUBLE COSTS

This appeal is by far not the first time that Halder has presented the identical unmeritorious claims to the Court of Appeals, at substantial expense and inconvenience to the appellee. IBM should be awarded, pursuant to Rule 38 of the Federal Rules of Appellate Procedure, the actual attorneys' fees incurred in opposing Halder's appeal, together with double costs.

This Court first rejected Halder's contentions that he had been improperly denied the pre-trial discovery to which he was entitled in Halder v. Sperry Rand Corp., Dkt. No. 76-7145 (2d Cir., Nov. 15, 1976), Halder v. Quotron Systems, Inc., Dkt. No. 76-7146 (2d Cir., Nov. 15, 1976) and Halder v. Informatics, Inc. et ano., Dkt. No. 76-7147 (2d Cir., Nov. 15, 1976. The decision in those appeals stated clearly and forcefully that Halder's arguments were devoid of merit, and that Halder's refusal to proceed to trial after his Rule 37 motion was denied warranted dismissal for failure to prosecute.

Judge Mishler . . . properly denied
Halder's Rule 37 motion to compel discovery.
The court's subsequent dismissal of the

appellant's complaint pursuant to Rule 41(b) was not an abuse of discretion. Judge Mishler accurately observed that Halder consciously used delay as a tactic of harassment. His failure to proceed with discovery over the period of several months was part of his plan. Dismissal of a complaint with prejudice for failure to prosecute is an appropriate sanction for such behavior. Ibid.

Despite the fact that this Court's decision in Sperry Rand, Quotron Systems and Informatics was made more than a month prior to the trial of this action, thereby putting Halder on notice that a subsequent refusal to proceed to trial on the identical ground would surely meet the same fate, he nevertheless refused to present his case at trial. He now prosecutes an identical appeal. Moreover, he does so in the face of this Court's recent decision in Halder v. Avis Rent-A-Car System, Inc., Dkt. No. 76-7507 (2d Cir., April 12, 1977), which in summary fashion once again affirmed Judge Mishler and awarded the appellee \$500.00 in attorneys' fees. An award of attorneys' fees and double costs is certainly appropriate. See Fluoro Electric Corp. v. Branford Associates, 489 F.2d 320 (2d Cir. 1973); Oscar Gruss & Son v. Lumbermens Mutual Casualty Co., 422 F.2d 1278 (2d Cir. 1970).

Conclusion

For the foregoing reasons, defendant-appellee International Business Machines Corporation respectfully

requests that the order and judgment of the court below dismissing the complaint be affirmed in all respects, and that it be awarded its awarded its attorneys' fees and double costs.

New York, New York
June 6, 1977

Respectfully submitted,

SEWARD & KISSEL
Attorneys for Defendant-
Appellee

Eugene P. Souther,
Kenneth J. Kelly,

Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- x
BISWANATH HALDER, :

Plaintiff-Appellant, : Docket No. 77-7099

- against - :

AFFIDAVIT OF SERVICE

INTERNATIONAL BUSINESS MACHINES :
CORPORATION, :

Defendant-Appellee.
----- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

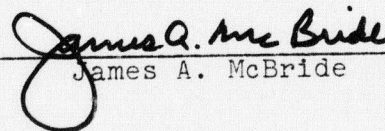
JAMES A. McBRIDE, being duly sworn, deposes and says:

1. I am not a party to this action, am over 18 years of age and reside at 9205 Ridge Boulevard, Brooklyn, New York 11209.

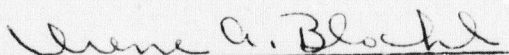
2. On June 6, 1977, I served the annexed Brief of Defendant-Appellee on:

BISWANATH HALDER
Plaintiff Pro Se
173-17 65th Avenue
Fresh Meadows, New York 11365

at the address designated by him for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.


James A. McBride

Sworn to before me
June 6, 1977


Notary Public

IRENE A. BLOCHL
Notary Public, State of New York
No. 30-4317905
Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 1979

Index No. 77-7099

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AFFIDAVIT OF SERVICE

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